No. 18,796

In the United States Court of Appeals
for the Ninth Circuit

RAY BRUMFIELD and AL LAMOTTE,
Appellants,

vs.

TRUCK INSURANCE EXCHANGE,
Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF IDAHO,
SOUTHERN DIVISION

APPELLEE'S BRIEF

MOFFATT, THOMAS, BARRETT & BLANTON
Eugene C. Thomas
Jeremiah A. Quane
536 First Security Building
Boise, Idaho

Attorneys for Appellee

ELAM, BURKE, JEPPESEN & EVANS
Residence: Boise, Idaho

Attorneys for Appellants

SUBJECT INDEX

Table of Authorities Cited

CASES

STATUTES

RULES

No. 18,796

In the United States Court of Appeals

for the Ninth Circuit

RAY BRUMFIELD and AL LAMOTTE,
Appellants,

vs.

TRUCK INSURANCE EXCHANGE,
Appellee.

APPELLEE'S BRIEF

STATEMENT RE JURISDICTION
(Rule 18(B) 9th Cir.)

Pleadings in this case establish jurisdiction in the United States District Court for the District of Idaho, Southern Division, pursuant to 28 U.S.C.A. 1322 (Tr. pages 4-7), as follows:

A. Diversity of Citizenship.

Plaintiffs-Appellants: Citizens of the State of Idaho.

Defendant-Appellee: Corporation organized under the laws of the State of California and authorized to do business in the State of Idaho, with offices in Boise, Ada County, Idaho, and with principal place of business in the State of California.

B. Amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

C. Appeal.

This appeal is from final judgment of the United States District Court for the District of Idaho, Southern Division, dismissing plaintiff's complaint (Tr. page 86), and is appealable to this Court pursuant to the provisions of 28 U.S.C.A. 1291 and Rule 73, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Although appellants' statement of the case is generally correct, appellee feels that certain facts have been omitted which bear directly on the issues joined. Also, in that portion of their brief entitled "Argument", appellants make reference to matters not contained in the transcript on this appeal. For these reasons, a restatement of the case as supported by the transcript is necessary. Parties will be referred to by name.

Ray Brumfield was the owner of a loader or jammer designed and used to load logs on logging trucks. He had contracted with Boise Cascade Corporation to load

logging trucks in the woods near Banks, Idaho, compensation to be based upon quantity of timber handled. (Tr. pages 17, 18, 25 and 64.) Mr. Brumfield had hired Al LaMotte to operate this loader, and Mr. LaMotte was in the course of the performance of the Brumfield-Boise Cascade contract when this accident occurred. Mr. Brumfield was not physically present at the time and place of the accident, which occurred at a logging operation at a remote location in the forest. (Tr. pages 17-19, 70 and 71.) Joseph Johnson also had a contract with Boise Cascade Corporation, but he was engaged in hauling logs, and his compensation received from Boise Cascade for performance of his contract was strictly as a trucker, and not as an operator of a loader. (Tr. page 70.)

Basically, the work was done at the logging camp by drivers such as Johnson bringing their trucks into the camp with a trailer mounted on the cab. The trailer would be removed, placed on the ground, and hooked to the tractor or cab. The loader would then be used to put the logs on the trailer. The truckdriver customarily remained at the area and took an interest and a part in the loading operation, and from time to time, would express a preferance as to the particular log to be loaded and the operator of the loader, such as Mr. LaMotte, would normally comply with the trucker's wish in this respect. Furthermore, the trucker was

customarily entitled to express his preference as to the placement or location of the logs as they were loaded, and his signals as to the place where a log should be dropped or placed were customarily honored and complied with by the operator of the loader. (Tr. pages 27, 28, 35-48 and 71.)

On December 27, 1961, Joseph Johnson drove his truck alongside Brumfield's loader to get a load of logs. The loading operation was commenced and carried out in the usual and customary manner as set forth above. At the time the accident occurred, Mr. Johnson's truck was being loaded and Mr. LaMotte was operating the loader. Johnson was positioned atop the logs on his truck that had previously been loaded and had, immediately before the accident, indicated to Mr. LaMotte where a particular log should be placed on top of the load, which log, while being lowered into position on the truck, was dropped by Mr. LaMotte, evidentally injuring Mr. Johnson. (Tr. pages 17-30, 55, 56, 70-72.)

During the loading operation, only the owner of the loader, Ray Brumfield, had authority to remove Mr. LaMotte as operator of the loader, or otherwise select the person to operate his loading machine. Likewise, the truckdriver, Mr. Johnson, had no control or authority over LaMotte's actual operation and manipulation of the loader. The manner in which the loader was run

was entirely up to Al LaMotte and Ray Brumfield. Nor did Mr. Johnson have authority to stop Al LaMotte or to start him in the performance of his work. (Tr. pages 29, 30, 44-48, 52, 64, 72 and 73.)

Subsequent to his injuries, Mr. Johnson brought suit for damages against LaMotte and Brumfield. Said action was commenced in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Adams. In this complaint, Mr. Johnson alleged that his truck was being loaded with logs through the use of a loader owned by Ray Brumfield and being operated by Al LaMotte, and that as a proximate result of the negligence of Al LaMotte, a log fell on and injured Joseph Johnson. (Tr. pages 4 and 5.) The State Court action prosecuted by Johnson is predicated solely upon Al LaMotte's alleged negligence in the manipulation and operation of the Brumfield loader. (Tr. pages 4 and 5.)

At the time of Johnson's accident, his truck was insured under a policy of liability and accident insurance issued by appellee to Joseph Johnson, who was the named insured in said policy. (Tr. page 5.)

The insuring clauses contained in this policy obligate appellee to pay all damages which the insured becomes legally obligated to pay, as well as defend any suit against the insured for such damages, arising out of the ownership or use of the insured's truck. (Tr. page 77.)

Similar coverage is extended to the named insured's employees in the event the following conditions of the policy are met:

> "III. (b) (3). With respect to the described automobile or a substitute automobile, any employee of the named insured, provided the actual use of the automobile is under the direction and control of the named insured and is in the course of his employment with the named insured."
>
> "VI. Use of the automobile includes the loading and unloading thereof." (Tr. page 77.)

After the State Court action was filed by Johnson, appellants brought this action for a declaratory judgment in the United States District Court for the District of Idaho to determine the liability, if any, of Johnson's insurance carrier, appellee herein, under this policy of insurance. (Tr. page 4.) In support of their right to relief, appellants alleged that they were "loaned servants" of Joseph Johnson at the time of the accident and therefore qualify as "insureds" under the loading and unloading coverage of the policy. (Tr. page 5.) In opposition to this complaint, appellee, Truck Insurance Exchange, moved for summary judgment of dismissal which was granted on May 15, 1963, from which this appeal is taken.

The sole issue raised by this appeal is whether Ray Brumfield and Al LaMotte were the employees of Joseph Johnson at the time of the accident thereby giving them

status of an "insured" under appellee's said policy.

ARGUMENT

PART I.

JOSEPH JOHNSON DID NOT HAVE AUTHORITY TO REPLACE APPELLANT, AL LAMOTTE, AT THE CONTROLS OF THE LOADER.

Appellants seek an adjudication that they were Joseph Johnson's loaned servants at the time Johnson was injured. Whether Al LaMotte and Ray Brumfield achieved this status is the singular issue presented by this appeal.

Joseph Johnson was apparently injured when a log was lowered on his leg by Al LaMotte. At this precise moment, LaMotte was operating the controls of the loader in an effort to place a log at its intended resting point on Johnson's truck. (Tr. pages 55, 56 and 61.) It is the gravamen of appellants' argument that LaMotte was the loaned servant of Johnson at this very moment, i.e., while LaMotte was actually manipulating the controls on the loader in an effort to place the log.

Under the law of Idaho, the relationship of "loaned servant" cannot exist when the purported temporary master lacks authority to replace the borrowed employee

at the controls of his machine. In the absence of this authority, the original employment relation continues as to the operator's acts in manipulating his machine. It is not altered by the fact that he is subject to the control of his alleged temporary employer as to where to go and what work to do. The absence of this single element is sufficient in itself to render nugatory the claim of "loaned servant".

By appellant LaMotte's own admission, Johnson had no authority whatsoever to replace him at the controls of the loader. This function was the prerogative of Ray Brumfield, the owner of the loader. We direct the court's attention to the deposition of Al LaMotte, which is replete with declarations to the effect that Johnson had no authority to replace him or select the operator of the loader.

> "Q. Now let me ask you this, did Mr. Johnson at the time you were loading his truck have any right or authority to order you to get out of your cab and to stop operating the loader? Would he have that kind of authority?
>
> "A. You mean to just get clear out of the machine?
>
> "Q. Yes.
>
> "A. No, not to get out of the machine.
>
> "Q. Would he have any authority to replace you and have somebody else operate the loader?
>
> "A. No.
>
> "Q. That was between Mr. Brumfield and you, I take it?

"A. Yes." (Tr. pages 46-47.)

"Q. Would anyone other than Ray have had the authority to take you off that machine or replace you or fire you up there?

"A. No. Ray was the man that was hiring me and could fire me if he chose.

"Q. And as far as authorizing anyone to operate the loader, Mr. Brumfield was the only one that had that authority, I take it?

"A. That's right, the company could have replaced the machine and me by just laying the machine off.

"Q. Cancelled the contract, in other words?

"A. Yes." (Tr. page 48.)

"Q. If you were ready to load now you would load and that was your decision, was it not?

"A. Yes.

"Q. Nobody could tell you and the truckdriver couldn't -- in other words, he could not determine when you did it?

"A. Say he wanted to move out for another truck to get by so he could park, something like that, I would wait for him.

"Q. Some reasonable basis?

"A. Yes.

"Q. As far as the question when the loading was to be done and so forth, this would be your decision, would it not?

"A. Well, I was to go to work at a certain time and quit at a reasonable time of the night.

"Q. What I had in mind, of course, your boss Mr. Brumfield was in this thing on a board foot basis; that is the way he got paid, wasn't it?

"A. That is right.

"Q. And when the truck was there to be loaded and he had a right through his employees to get on and get that truck loaded and out and get another one loaded and out, did he not?

"A. Yes.

"Q. So no truckdriver could designate to the loader operator to slow down or stop or wait?

"A. No, we were getting paid by the hour.

"Q. This was within your authority, wasn't it?

"A. I was to get every log out I could get and still be safe -- safe operation.

"Q. That is what I was getting at, the time when you worked and how fast, that was your authority and the truckdriver had no authority in that, did he?

"A. No." (Tr. pages 63-64.)

We also refer the court to the affidavit of Joseph Johnson, who the appellants claim was their temporary employer during the loading operation. For the court's convenience, we quote portions of this affidavit:

"During the entire loading process on the day of my accident, I had no control or authority over LaMotte's operation of the loader. The manner in which the loader was run was entirely up to LaMotte and Brumfield.

"I have no authority to select the person who will operate Brumfield's loader, or any of the other loaders in the Burns Creek operation.

"If LaMotte had ever refused to load my truck, there is nothing I could have done about it." (Tr. pages 72-73.)

PART II.

THE RELATIONSHIP OF "LOANED SERVANT" CANNOT EXIST WHEN THE PURPORTED TEMPORARY EMPLOYER LACKS AUTHORITY TO REPLACE THE PURPORTED LOANED SERVANT AT THE CONTROLS OF HIS MACHINE.

The latest expression of the Idaho Supreme Court on the subject of "loaned employee" is found in the following cases: Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 Pac.2d 400 (1952); Cloughley v. Orange Transportation Company, 80 Idaho 226, 327 Pac.2d 369 (1958); and, Brown et al v. Arrington Construction Company et al, 74 Idaho 338, 262 Pac. 2d 789 (1953). Under the authority of these decisions, the decisive and ultimate factor is whether the allegedly "loaned employee" can be replaced or discharged from the controls of his machine at the will of the "temporary employer".

Alluding to the Nissula decision, it appeared that the plaintiff was the owner of a caterpiller tractor which he rented to the defendant, Southern Idaho Timber Protective Association, to be used by the defendant for fighting forest fires. The plaintiff's brother, who had been employed by the plaintiff to operate this particular tractor for some time, was designated to operate the tractor in the course of the fire fighting for the defendant. Plaintiff was compensated for the use of the tractor on

the basis of an agreed rate per hour for the tractor and operator as a unit, with fuel, oil, grease and expenses incidental to its operation. In the course of the operation of the tractor, the defendant had complete control over the operator as to where to go, what work to do and how the work was to be done. During the fire fighting operation, defendant's foreman ordered the tractor taken to a hillside where it became stuck and subsequently damaged in the fire. Plaintiff brought the action to recover damages to the tractor and for its loss during the period it was under repair.

Defendant contended, inter alia, that the driver of the tractor was still the employee of the plaintiff, that the damages complained of were caused by the negligence of the operator, therefore, the plaintiff had no cause of action against the defendant. Plaintiff, in turn, urged that the operator of the tractor under the "loaned servant rule" became the servant of the defendant during the operation of the tractor, and that any negligence on the operator's part while so engaged was imputed to the defendant.

At the close of all the evidence the defendant moved for a directed verdict which was granted. Plaintiff then prosecuted an appeal to the Supreme Court of Idaho which reversed the trial court entering an order for a new trial. It is pertinent to note that Fred M. Taylor,

then one of the attorneys of record representing the plaintiff on appeal, is the Federal District Judge who entered the order of dismissal in the present action.

The Supreme Court reviewed all of the evidence produced at the trial bearing on the negligence of the operator himself and the defendant's negligence in directing the operator to move the tractor into a dangerous area. The court concluded that the evidence was conflicting on these points and the plaintiff should have been entitled to submit the issue of negligence to the jury, which right was denied him by the directed verdict. In discussing this aspect of the case, the court noted and expressly held that the operator was the loaned servant of the defendant as to the operator's acts in moving the tractor into the dangerous area because he was directed to do so by the defendant's agent, while on the other hand, the operator remained the servant of the plaintiff in the actual manipulation and operation of the machine itself. We quote from the court's opinion wherein this notion is vividly demonstrated:

> "Here the operator was selected and paid by plaintiff. The plaintiff retained the right to discharge him and substitute another. At least no inference can be drawn from the record that the defendant had the right to replace him. Under these circumstances, as to his acts in handling and operating the tractor, he remained the servant of the owner. And as to such acts, this relationship is not altered by the fact that he was subject to the

> control of the defendant as to where to go and what work to do." Page 42. (Emphasis ours.)

The Brown case, 74 Idaho 338, 262 Pac. 2d 789, presented a similar issue. Respondent Brown brought the action for personal injuries against defendant Skinner and appellant Arrington Construction Company. Arrington had a contract with Bonneville County to construct a new bridge across a canal. The County had torn down the old bridge but had no way of removing the debris. The County, therefore, arranged with Arrington for the removal of this debris by a mobile dragline and operator. Defendant Skinner, the operator provided by Arrington, took the dragline to the site and was told by the County employees what to do.

Brown was employed by the County and was operating a grader in the vicinity of where Skinner was working with the dragline. During the course of Skinner's operation, the dragline hit a power line and the current ran through Skinner's machine to the ground, injuring Brown.

Brown contended that Arrington was liable for his injuries due to the negligence of its servant, Skinner. Appellant Arrington contended, however, that any negligence on the part of Skinner could not be imputed to it because Skinner was the servant of Bonneville County under the "loaned servant" doctrine. The trial court entered judgment against appellant which was affirmed

on appeal. In the course of its opinion, the court quoted extensively from the **Nissula** case, supra, saying:

> "In **Nissula v. Southern Idaho Timber Protective Association**, 73 Idaho 37, 245 Pac. 2d 400, a tractor and its operator were rented to defendant. We recognize that such operator remained the servant of the owner of the tractor as to his acts in handling and operating the machine, but was the servant of the defendant in placing the machine in a hazardous position to its damage upon the order of defendant. And we further said that as to the operator's acts in manipulating the machine, his relationship as servant of the general employer was not altered by the fact that he was subject to the control of the defendant as to where to go and what work to do." (Emphasis ours.)

As these authorities indicate, the vital and ultimate factor determinative of a "loaned servant" status is the right of the temporary employer to replace the temporary servant. The operator's acts in the manipulation of his machine, in the absence of this right, are in law those of his regular employer.

If any doubts remained after these decisions, they were dispelled by the Idaho Court in its opinion in the **Cloughley** case, 80 Idaho 226, 327 P. 2d 369. In this case, plaintiff was employed by Detweiler, Inc. Defendant Park was regularly employed as a truckdriver by defendant, Orange Transportation Company. Detweiler was the consignee of a shipment consisting of two boilers, transported by Orange to Detweiler's building site. Park

was the driver of the diesel tractor owned by Orange which delivered the boilers. When Park arrived at the job site he was told by Detweiler's superintendent, Pearcy, to park the trailer in a certain place and await the arrival of a crane to unload the boilers. When the crane arrived, Pearcy told plaintiff to go on top of the boiler and remain there during the unloading operation. Pearcy told Park to operate the truck during the unloading, the plan being to raise the boiler by means of the crane, then Park would drive the truck from under the boiler, and the boiler would be lowered to the ground. Pearcy advised Park that he would station himself near the rear of the truck and by means of signals, would indicate to Park when to move forward and when to stop. During the course of the operation, the boiler became wedged in the trailer, causing the boom of the crane to swing laterally, forcing plaintiff to jump to the ground to avoid injury. Plaintiff suffered injuries as a result of the jump and brought this action. His claim was based on the negligence of Park, allegedly acting as servant of Orange, in driving the truck in a negligent manner during the unloading operation.

Defendant Orange contended that while Park was driving the truck to assist in unloading, he was a loaned servant and employee of Detweiler, Inc., thereby making him a fellow servant of the plaintiff and limiting plaintiff's recovery solely to the Workman's Compensation

Law benefits.

Under the rules of the Interstate Commerce Commission, which were applicable in this transaction, it was the duty of Detweiler, Inc., the consignee of the boilers, to perform the unloading operation.

The court held that Park was the loaned servant of Detweiler, Inc., and plaintiff's sole remedy was under the Workman's Compensation Laws. In support of his position, plaintiff argued that the driver of the truck, regularly employed by the defendant, remained in the defendant's employ during the unloading operation, citing and relying on the Nissula case for authority. We would like to quote in full from the court's opinion regarding this contention:

> "Plaintiff cites and relies upon Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 Pac.2d 400. In that case the defendant rented a tractor with its operator from the plaintiff to be used in fighting a forest fire. The tractor was damaged by fire, which plaintiff charged to the negligence of the defendant. Defendant charged the damage was caused by the negligence of the operator, who remained the servant of the owner. It was there held that if the operator was selected by the owner, who retained the right to discharge him and substitute another, then in the manipulation and operation of the tractor itself, the operator remained the servant of the owner even though subject to the control of the defendant as to where he should go and what work he was to do. A non-suit having been granted in that case the cause was remanded for a new trial on the issue

> as to whose negligence caused the injury." (Emphasis ours.)

The court then proceeded to distinguish the **Nissula** case from the case under consideration, saying:

> "That case is not in point here, because in this case Park (driver) need not have been used in the unloading operation and could have been replaced at the wheel of the tractor by another driver at the will of Detweiler, Inc." (Emphasis ours.)

In the **Cloughley** case, the temporary employer had the right to replace the driver of the truck by virtue of the rules of the Interstate Commerce Commission. In the **Nissula** case, the alleged temporary employer did not have authority to replace the operator of the caterpiller, although in the latter case the purported temporary employer had control over the operator in respect to the details of the work to be done and the manner in which it was to be performed. This fundamental distinction was aptly brought to focus by the court in the **Cloughley** opinion.

The undisputed facts in the present case have a striking resemblance to the factual pattern of the **Nissula** and **Brown** cases. Here the purported temporary employer, Joseph Johnson, had limited control over appellant, Al LaMotte's operation of the loader, in that Johnson, pursuant to customary practices followed in lumber operations of this kind, could select the logs LaMotte was to

load and direct where these logs were to be placed on Johnson's truck.

However, Johnson had no authority whatsoever to replace LaMotte at the controls of the loader, or otherwise select the individual who would operate the loader. This being the case, any acts on the part of Mr. LaMotte in respect to his manipulation and operation of the loader remained in law the acts of his original employer, Ray Brumfield, and did not become the acts of Joseph Johnson.

It is clear that Ray Brumfield was not and could not be the "loaned servant" of Johnson.

PART III.

THE AUTHORITIES CITED AND RELIED UPON BY APPELLANTS DO NOT SUPPORT THEIR POSITION.

Appellants rely upon the following decisions: Brown v. Arrington Construction Company, 74 Idaho 338, 262 Pac.2d 789; Cloughley v. Orange Transportation Company, 80 Idaho 226, 327 Pac.2d 369; Crutchfield v. Melton, 270 Pac.2d 642; Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 Pac.2d 400; Pinson v. Minidoka Highway District, 61 Idaho 731, 106 Pac.2d 1020; Snetcher and Pittman v. Talley, 168

Okla. 280, 32 Pac.2d 883.

All of these decisions are from Idaho, except Crutchfield and Talley, which are Oklahoma cases. It goes without saying that the Oklahoma opinions are not the law of Idaho and cannot be considered as such. In fact, the holdings in these cases, even though they may represent the law of Oklahoma, are totally and absolutely irrelevant to these proceedings in view of the attitude taken by the Idaho Court on the "loaned servant" doctrine. In short, there is no need to look beyond the Idaho Courts for authoritative material on the subject when the law has been so firmly established in this jurisdiction.

The case of Pinson v. Minidoka Highway District, 61 Idaho 731, 106 Pac.2d 1020, is likewise cited by appellants. This was an action for benefits under the Workman's Compensation Laws and presented the question whether the deceased worker was an employee of appellant at the time he became ill, from which illness he subsequently died. The deceased was regularly employed by another and lent to the appellant for the purpose of operating a jackhammer. During the course of his operation of the hammer deceased became ill and later succumbed. Appellant had general authority to supervise deceased's work.

It was held that the deceased was an employee of appellant under the liberal definition of "employee" in

the Workman's Compensation Laws and he was therefore entitled to benefits. The case did not, in any wise, involve circumstances similar to those in the suit at bar, but even if it had, it would no longer represent the rule of decision in Idaho, for the reason that it was decided prior to the **Nissula**, **Cloughley** and **Brown** cases.

Appellants also devote considerable time to a discussion of the **Cloughley**, **Nissula** and **Brown** cases. It is their contention that these opinions support their position, notwithstanding the clear language and obvious intent of the Supreme Court in these cases, to which we again make reference:

Nissula, 73 Idaho 37, 245 Pac. 2d 400, decided in 1952:

> " . . . as to his acts in handling and operating the tractor, he remained the servent of the owner."

Brown, 74 Idaho 338, 262 Pac. 2d 789, decided in 1953:

> "In **Nissula v. Southern Idaho Timber Protective Association**, 73 Idaho 37, 245 Pac. 2d 400, a tractor and its operator were rented to defendant. We recognize that such operator remained the servant of the owner of the tractor as to his acts in handling and operating the machine, but was the servant of the defendant in placing the machine in a hazardous position to its damage upon the order of defendant. And we further said that as to the operator's acts in manipulating the machine, his relationship as servant of the general employer

was not altered by the fact that he was subject to the control of the defendant as to where to go and what work to do."

Cloughley, 80 Idaho 226, 327 Pac.2d 369, decided in 1958:

"Plaintiff cites and relies upon Nissula v. Southern Idaho Timber Protective Association, 73 Idaho 37, 245 Pac.2d 400. In that case the defendant rented a tractor with its operator from the plaintiff to be used in fighting a forest fire. The tractor was damaged by fire, which plaintiff charged to the negligence of the defendant. Defendant charged the damage was caused by the negligence of the operator, who remained the servant of the owner. It was there held that if the operator was selected by the owner, who retained the right to discharge him and substitute another, then in the manipulation and operation of the tractor itself, the operator remained the servant of the owner even though subject to the control of the defendant as to where he should go and what work he was to do. A non-suit having been granted in that case the cause was remanded for a new trial on the issue as to whose negligence caused the injury."

We respectfully submit that the Idaho Supreme Court has expressed itself in no uncertain terms on the issue of "loaned servant" in cases involving the operation and use of equipment. Based on these holdings, the appellants were not the loaned servants of Joseph Johnson when Johnson sustained the injuries for which he prosecuted his State Court action. Consequently, these appellants do not qualify as "employees" within the

purview of appellee's insurance policy and the trial court's judgment should be affirmed.

Dated this 3rd day of January, 1964.

Respectfully submitted,

MOFFATT, THOMAS,
BARRETT & BLANTON
Attorneys for the Appellee
Residence: 536 First
Security Bldg.,
Boise, Idaho

By Wayne C. Thomas

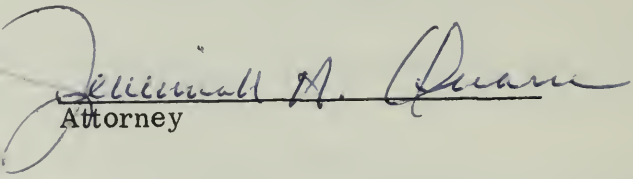
By Jeremiah A. Quane
of the firm

Service of the foregoing Brief of Appellee is hereby accepted by receipt of a copy thereof this 3rd day of January, 1964.

Elam, Burke, Jeppesen & Evans,

I certify that, on connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance

with those rules.



Attorney